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No. 09-1494

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONERS FILED BY AMICI CURIAE TEXAS CIVIL RIGHTS PROJECT, NATIONAL COALITION AGAINST CENSORSHIP, FIRST AMENDMENT PROJECT, WASHINGTON AREA LAWYERS FOR THE ARTS, THE ARTHOUSE AT THE JONES CENTER, and BIG UMBRELLA STUDIOS

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INTEREST OF *AMICI CURIAE*

The **Texas Civil Rights Project** ("TCRP") is a non-profit public interest law organization of about 3,000 members that for the last 20 years has promoted racial, economic, and social justice, as well as civil liberties, through education, advocacy, and litigation.[1] The Fifth Circuit's decision adversely affects the rights of artists to display their visual art on private property. This case is significant to TCRP, which has always had a strong interest in ensuring that individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action.

The **National Coalition Against Censorship** ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country. NCAC produces legal and scholarly analyses of important free-speech cases and controversies; educates policy-makers,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice and have consented to the filing of this brief. Such consents are being lodged herewith.

scholars, professional groups, and the general public on a wide range of free-expression issues; assists individuals and community organizations dealing with censorship; and promotes discussion and dialogue among diverse stakeholders in free-speech debates. To further its interest in protecting artistic expression, NCAC has established the Arts Advocacy Project, which works with visual artists around the country.

The **First Amendment Project** ("FAP") is the only nonprofit organization in the country dedicated to providing free legal services exclusively on public interest free speech and free press matters. Artists are among FAP's core constituency. FAP represents artists whose First Amendment right to create and display or perform their art is threatened by governmental action. As such, FAP has a strong interest, both for itself and on behalf of its clients, in ensuring that artists' First Amendment rights maintain their vigor.

Washington Area Lawyers for the Arts ("WALA") is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C. metropolitan area, annually serving hundreds of individuals and organizations, including artists who create outdoor sculpture with non-traditional media. Most of WALA's clients have yet to receive widespread acclaim and cannot rely on courts to perceive "greatness" in their art as a condition for protection under the First Amendment.

The **Arthouse at the Jones Center** ("Arthouse") located in Austin, Texas, creates meaningful opportunities to investigate and experience the art of

our time through exhibitions, programs and commissions of new work. Arthouse is currently renovating its facility to include a large display window facing Congress Avenue in downtown Austin, and is concerned about the Fifth Circuit's troubling decision that artwork incorporating automobiles or automobile parts may be constitutionally prohibited from public display even behind a gallery window.

Big Umbrella Studios ("BUS") is a cooperative art gallery and shared studio in San Francisco, California. BUS was established by artists as a place to create and show their work, and encourages artistic experimentation, community involvement, and is an open door to the local society of urban artistic action and collaboration.

SUMMARY OF ARGUMENT

This case involves the municipal seizure from private property of a work of visual art created from a wrecked automobile. The parties stipulated that Petitioners always intended to physically modify the wrecked car to transform it into artwork, that two Petitioners, visual artists, painted the car with their unique images, intending to convey specific ideas to their roadside audience, and that after completion the artwork projected some level of artistic expression. Yet the Fifth Circuit in *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010), *petition for cert. filed*, __ U.S.L.W. __ (U.S. June 4, 2010) (No. 09-1494), upheld the city's complete prohibition of public display of this artwork anywhere in the city limits, even on private property, and held that the case did not require any analysis under the First Amendment.

Certiorari should be granted because *Kleinman* conflicts with *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557 (U.S. 1995), by holding that only "great works of art" merit constitutional protection. In addition, certiorari should be granted to resolve the Circuit split that *Kleinman* creates. In the First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits, numerous forms of expressive conduct—including cabaret music, internet domain names, artistically arranged nudes, zombie protests, graffiti-painted clothing, video games, a minor classroom protest, and sidewalk paintings of nature scenes, none of which, perhaps, can be called "great works of art," are held to be expressive conduct for which a reviewing court must perform a First Amendment analysis and require the government to justify its restrictions on artistic or symbolic expression.

In contrast, federal district courts following the Fifth Circuit's approach can now summarily uphold any reasonable state regulation that burdens expressive conduct or artistic expression, so long as no "great works of art" are involved. The Court should grant certiorari to correct this troubling misinterpretation of the Court's precedent and to resolve the Circuit split on what constitutes protected symbolic or artistic expression.

Although ending its analysis with a determination that the case does not involve a great work of art, the Fifth Circuit "[i]n an abundance of caution" applied the intermediate scrutiny test under which the government's power to regulate is balanced with an individual's right to speak. The Fifth Circuit concluded

that the application of the ordinance to Petitioners passed muster, but the analysis is flawed because the Fifth Circuit entirely denies any consideration of Petitioners' right to publicly display their artwork on private property. Certiorari should be granted because *Klemman* conflicts with *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by holding that a complete citywide ban on public display of the artwork leaves open ample alternative channels of communication to the Petitioners.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's ruling conflicts with this Court's decision in *Hurley*, which established that expressive symbolic conduct is protected expression even when no particular message is intended or received.

In holding that a veterans council's selection of groups to march in a parade, including the choice to exclude a gay rights group, constituted protected expression, this Court in *Hurley* held that expressive conduct need not convey "a particularized message." Instead, as the Court made clear through the use of famous examples, the First Amendment "unquestionably shielded" symbolic, expressive conduct such as art done for art's sake:

> [T]he Constitution looks beyond written or spoken words as mediums of expression. . . . [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a

> particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Id. at 569 (citations, quotation marks and brackets omitted). Many lower court symbolic speech cases have since quoted and applied *Hurley*'s picturesque language. And as shown in Section D below, each case interpreted *Hurley* as ***expanding*** the universe of protected expressive conduct. The Fifth Circuit, however, departed from that approach.

B. *Kleinman* misinterprets *Hurley* to hold that the First Amendment applies to an expressive work of visual art only when an appellate court judges it to be a "great work of art."

The Fifth Circuit held that no First Amendment analysis was needed of a city regulation that prohibits public display of Petitioners' artwork anywhere within the city limits. Despite the parties' stipulation that the Petitioners' artwork contains and projects artistic expression, the Fifth Circuit held that the category of "constitutionally-protected expression . . . is not so unbounded." *Kleinman*, 597 F.3d. at 326.[2] Quoting

[2] This Court must refuse to consider an argument that contradicts a joint factual stipulation of the parties. *See Christian Legal Soc'y v. Martinez*, No. 08-1371, 2010 WL 2555187, at *9-10 (U.S. June 28, 2010) (holding that "factual stipulations are formal concessions that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact") (internal quotes and ellipses omitted).

Hurley's iconic language regarding "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," the Fifth Circuit held that "*Hurley* refers solely to great works of art," and that "[n]either in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." *Id.*

The Fifth Circuit expressed its "skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression," and pointedly disparaged "the capability [and] intention of the artists" who created "this cactus planter, a three-dimensional advertisement for a novelty shop." *Id.* at 326-27. "Protected expression takes many forms, but *Hurley*'s reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression." *Id.* at 327.

The Fifth Circuit thus concluded that ***no First Amendment analysis was necessary*** to adjudicate Petitioners' First Amendment as-applied challenge to the city's junked vehicle ordinance, although it completely prohibits the public display of their work of visual art. "When the 'expressive' component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation. We therefore pretermit 'recourse to principles of aesthetics.'" *Klemman*, 596 F.3d at 327-28 (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 95 (2d Cir. 2006)).

Although the Fifth Circuit went on to apply a cursory First Amendment analysis in "an abundance of caution," *id.* at 328, *Kleinman*'s primary holding is that the First Amendment only applies to "great works of art," a holding that now binds all federal courts in the Fifth Circuit. *See United States v. Wright*, 496 F3d 371, 375 n.10 (5th Cir. 2007) (holding that "alternative holdings are binding, they are not dicta"). Accordingly, if this Court allows *Kleinman* to stand, municipal governments in Texas, Mississippi and Louisiana are free to completely prohibit visual artists from publically displaying their works from private property if such works are not judged to be "great art."

C. The Fifth Circuit's creation of a "great works of art" test out of whole cloth is contrary to decades of this Court's rulings.

The Fifth Circuit thus has created a new test that is contrary not only to *Hurley*, but also to numerous other holdings of this Court that have confirmed repeatedly that expression does not have to be adjudged valuable, great or profound to be constitutionally protected, and that it is inappropriate for courts to make determinations of artistic value or greatness.

Artistic expression cannot be governmentally prohibited "simply on the basis that some speech is not worth it." *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). The Court in *Stevens* forcefully rejected any suggestion that speech must be assessed for its "value" before it can be considered protected expression. *Id.* at 1585. Any suggestion that the Court should adopt such "a free-floating test for First Amendment coverage" is

"startling and dangerous." *Id.* "***Most*** of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical or artistic value' (let alone serious value) but it is still sheltered from government regulation. Even 'wholly neutral futilities come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Id.* at 1591 (emphasis in original) (some internal quotation marks and ellipses omitted) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

Freedom of speech includes "the freedom to speak foolishly and without moderation," and accordingly even "distasteful," "trifling and annoying" expression is protected from censorship. *Cohen*, 403 U.S. at 25-26. It is "often true that one man's vulgarity is another man's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25; *see also Holder v. Humanitarian Law Project*, No. 08-1498, 78 U.S.L.W. 4625, 2010 WL 2471055, at *18-19 (U.S. June 21, 2010) (reaffirming *Cohen*). Even a "crude and amateurish and perhaps unappealing" skit performed in the street is protected artistic expression. *Schacht v. United States*, 398 U.S. 58, 61-64 (1970). In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 917 (2010), the Court emphasized that the political film at issue was artistic expression deserving of protection whether it was "insightful and instructive" or unfair and trite.

> [S]ome might find it to be neither high art nor a fair description on how to set the Nation's

> course. . . . Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."

Id. (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in part and dissenting in part)).

The Court has carefully scrutinized municipal regulations to ensure that a governmental authority is not imposing its own bureaucratic vision of artistic "quality" on artists in the guise of neutral regulation. In *Ward*, the Court noted concerns that "the government may not interfere with artistic judgment," and upheld a municipal regulation after determining that the city was ***not*** "seeking to assert artistic control over performers." 491 U.S. at 792-93.

In addition to being constitutionally infirm, the Fifth Circuit's new test is impractical and subjective.

> [I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada and art in the replication of a soup can. . . . Just as there is no use

> arguing about taste, there is no use litigating about it. For the law courts to decide 'What is Beauty' is a novelty even by today's standards.

Pope v. Illinois, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring).

"[T]he First Amendment does not permit a majority to dictate . . . the value that may be found in various pieces of work. . . . Reasonable people certainly may differ as to what constitutes literary or artistic merit." *Id.* at 506 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens pointed out that time has disproved previous "arguments formerly made about what are now valued as works of art." *Id.* at 519 (Stevens, J., dissenting). "It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population. . . . First Amendment protection surely must not be contingent on this type of subjective determination." *Id.* at 512-13 (internal quotes omitted). "In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." *Id.* at 519.

Thus, this Court has long held that the First Amendment forbids governments or courts to dictate "what is good art." Expression may not be governmentally suppressed "because it failed to meet some standard of worth or value or propriety." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 152 (1946).

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

Id. at 157-58 (footnotes omitted); *see also United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 137 (1973) ("[W]hat may be trash to me may be prized by others.") (Douglas, J., dissenting).

In a case involving symbolic expression by conduct, the Court confirmed that the government does not have the power to "prescribe what shall be orthodox." *Texas v. Johnson*, 491 U.S. 397, 415 (1989); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, whether it be of the popular variety or not.").

In sum, the Fifth Circuit has basically judged that Petitioners' artwork is so inconsequential that the government has the unbounded power to require that the artwork be completely hidden from public view. This unconventional piece of visual art made from a wrecked automobile may not be to everyone's taste, but

"a requirement that . . . art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan*, 327 U.S. at 158.

D. The Fifth Circuit's novel and unduly restrictive interpretation of *Hurley* is contrary to that of many other courts that have quoted the same language and has created a Circuit split.

The Fifth Circuit's interpretation of *Hurley* as ***contracting*** First Amendment protection of expressive conduct is contrary to the interpretation of seven other federal circuit courts, which quoted and interpreted *Hurley*'s passage about Pollack, Schöenberg and Carroll to mean that expressive conduct does not require any specific message in order to be protected, and to trigger a First Amendment analysis requiring the government to justify its restriction of the expression.

First Circuit:

- *Casey v. City of Newport, Rhode Island*, 308 F3d 106, 110 (1st Cir. 2002) (amplified instrumental music and cabaret singing protected under *Hurley* because "[e]xpression need not include words to qualify for First Amendment protection");

Second Circuit:

- *Bery v. City of New York*, 97 F3d 689, 696 (2d Cir. 1996) (under *Hurley*, works of visual art such as "paintings, photographs, prints and

sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection");

- *Mastrovincenzo v. City of New York*, 435 F3d 78, 92, 97 (2d Cir. 2006) (interpreting *Hurley* as holding that protected expressive conduct need not convey a particularized message; holding that graffiti-painted hats and clothing "serve a predominantly expressive purpose, and their sale is consequently protected under the First Amendment");

- *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F3d 573, 586 (2d Cir. 2000) (certain internet domain names could be used for "an expressive purpose" and be protected communication under *Hurley*);

- *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F3d 197, 205 n.6 (2d Cir. 2004) (noting "*Hurley*'s caution against demanding a narrow and specific message before applying the First Amendment");

- *Tanick v. Safir*, 209 F3d 67, 82 (2d Cir. 2000) (photo shoot of "75 to 100 nude models arranged in an abstract formation" was "artistic activity . . . entitled to some First Amendment protection" under *Hurley*);

Third Circuit:

- *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1087 (3d Cir. 1995) ("[I]n the wake of *Hurley* . . . the threshold test of expressiveness necessary to raise a First Amendment compelled expression claim is no longer as stringent");

Sixth Circuit:

- *Condon v. Wolfe*, 310 F. App'x 807, 819-20 (6th Cir. 2009) (*Hurley* "minimized the 'particularized message' requirement");

Eighth Circuit:

- *Baribeau v. City of Minneapolis*, 596 F.3d 465, 470, 477 (8th Cir. 2010) (plaintiffs who "dressed as zombies," to "protest the 'mindless' nature of consumer culture" were "engaged in protected expressive conduct" under *Hurley*);

- *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, 329 F.3d 954, 957 (8th Cir. 2003) (video games are protected expression under *Hurley*);

Ninth Circuit:

- *White v. Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("So long as it is an artist's self-expression, a painting will be protected under [*Hurley*], because it expresses the artist's perspective");

Eleventh Circuit:

- *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (student's silent raising of fist and refusal to say the Pledge of Allegiance was protected; *Hurley* "liberalized" the test of "whether a particular act counts as expressive conduct," requiring only "***some*** sort of message," not necessarily "a ***specific*** message") (emphasis original).

Under these circuit decisions (as well as in similar decisions by state supreme courts and federal district courts)[3] numerous forms of symbolic and expressive conduct—none of them "great art"—were held to

[3] *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (T-shirts of the Three Stooges were protected because *Hurley* "made it clear that a work of art is protected by the First Amendment even if it conveys no discernable message"); *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01-Civ-1226 (DAB), 2004 WL 1982520, at *9 (S.D.N.Y. Sept. 8, 2004) ("artwork has been deemed 'a quintessential form of expression' worthy of and requiring First Amendment protections," and under *Hurley*, "[i]t is of no consequence that the [cast-iron sculpture at issue] has no particularized message"); *Cunningham v. New Jersey*, 452 F. Supp. 2d 591, 595 (D.N.J. 2006) (*Hurley* "relaxed its requirement of 'particularized message' somewhat"); *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1229 (W.D. Wash. 2007) (under *Hurley*, "instrumental compositions, like the dodecaphonic music of Arnold Schoenberg, qualify for First Amendment protection"), *aff'd*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1937 (2010); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 814, 854 n.6 (N.D. Ohio 2004) ("the Supreme Court relaxed the requirement that the message be particularized in *Hurley*").

require First Amendment analysis. *Hurley* itself involved a parade with no particular message, hardly a "great work of art," either.

The Fifth Circuit thus stands alone in summarily upholding any "reasonable state regulation" that burdens expressive conduct or artistic expression that is not "great" art. *Kleinman*, 596 F.3d at 327. The Court should grant certiorari to resolve the Circuit split and correct this troubling misinterpretation of its precedent.

E. The Fifth Circuit's application of *O'Brien* did not take into account the significant fact that this artwork was being displayed on private property.

In an "abundance of caution," almost as an afterthought, the Fifth Circuit performed a cursory analysis under *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward*, concluding that the actual effect of the ordinance on the public display of Petitioners' artwork was "immaterial," and upholding the ordinance as generally justified by the "City's right to regulate junked vehicles." *Kleinman*, 597 F.3d at 328.

The Fifth Circuit's flawed analysis should not be allowed to stand if artistic expression and public display of artwork on private property are constitutionally protected. This Court recently reaffirmed the *O'Brien* standard, noting that "a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder*, 2010 WL 2471055, at *18 (citing

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)) (internal quotation marks omitted). Citing *O'Brien* and *Ward*, the Fifth Circuit considered whether the ordinance is "reasonably tailored to achieve the City's legitimate interests" and provides an "adequate alternative means of expression." *Kleinman*, 597 F.3d at 328-29. The Fifth Circuit's flawed analysis concluded that "the ordinance is limited to regulating the medium and the location of the car planter." *Id.* at 329. This ruling does not merely "regulate," but completely forbids Petitioners to use the "medium" of vehicles or vehicle parts in publically displayed artwork and allows that the only "location" available to display car-based artwork is inside a building, behind an opaque fence or under a canvas cover.

The Fifth Circuit's conclusion thus entirely forecloses any public display of the artwork on the Planet K property. Indeed, it prevents public display of the artwork anywhere within the city limits. As expressive conduct, the artwork and its public display are entitled to full protection under the First Amendment. Reviewing the ordinance under an intermediate scrutiny standard, the Fifth Circuit fails to give weight to the fact that the ordinance, as applied, completely forecloses Petitioners' public display of the artwork, made from the artists' chosen medium, a car, on private property.

Under the intermediate scrutiny standard, "reasonable restrictions on the time, place, or manner of protected speech" are permitted provided that "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly

tailored to serve a significant government interest'" and "'leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Fifth Circuit applied the intermediate scrutiny standard without regard or consideration for the character of the property at issue—a public display of artwork on private property. Under the Fifth Circuit's flawed analysis, any such display is entirely banned.

This Court has recognized that "the character of the property at issue" impacts the determination of the extent of First Amendment protection. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). This case involves a public display of artwork on private property. Activity that takes place on private property requires examination of the interests advanced by the city "with particular care." *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974). Moreover, this Court has long noted a "special respect for individual liberty" on private property. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). The need to regulate speech from that location is "surely much less pressing" than the need to regulate speech in public places. *Id.*

In *Ladue*, the plaintiff displayed a sign protesting the first Gulf War on her front lawn. In displaying the sign, she disobeyed a local ordinance that, with certain exceptions, prohibited signs on residential front lawns. Balancing the ordinance's public purpose with the resident's right to communicate from his or her own property, this Court concluded that the ordinance's purpose did not justify an almost complete ban on the

resident's "important medium of speech." *Id.* at 56. Noting "the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities," the Court distinguished regulation of speech from the speaker's property from the regulation of speech in a public place. *Id.* at 58 (citing *Spence*, 418 U.S. at 409). In *Spence*, the individual's display of a flag "on private property" was an important factor leading to an analysis different from one applied in considering use of public areas. 418 U.S. at 409. Here, the City's asserted interest in enforcing the ordinance against Petitioners is in "reduc[ing] the blight and attractive nuisance problems caused by vehicular wrecks." *Kleinman*, 597 F.3d at 329. If reduction of "blight" is the governmental interest at stake, then the city's interest is merely to remove from the public view any unconventional artwork that it considers to be unsightly. Such a justification for censoring artistic expression is entirely illegitimate. *See Ward*, 491 U.S. at 793 ("Any government attempt to serve purely esthetic goals by imposing subjective standards . . . would raise First Amendment concerns."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (noting that "esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"). Also, the Fifth Circuit does not explain how applying the junked vehicle ordinance to Petitioners' artwork reduces any "attractive nuisance" problem, if Petitioners are free to erect a fence in front of the artwork, "erect a sign or display a poster of the car-planter visible to the public" and "invite the public" to come inside the enclosure. *See Kleinman*, 597 F.3d at 329.

This Court has long made clear that expression on private property implicates different considerations than expression on public property, and must be treated differently. Several years before *Ladue*, the Court considered the validity of an ordinance that prohibited the posting of signs on public property. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Petitioners argued that the prohibition against signs could not be justified on esthetic grounds because the ordinance did not apply equally to signs on private property. This Court rejected the argument. "**The private citizen's interest in controlling the use of his own property justifies the disparate treatment.**" *Id.* at 811 (emphasis added). In addition, limiting the ban to public property meant that speakers still had a means of communication from ***private*** property. *Id.* This Court's decisions demonstrate that the location of the artwork on private property is an important interest that the Fifth Circuit was required to consider in undertaking an intermediate scrutiny analysis. Here there is no need to mediate competing uses of public space. In sum, the ordinance's restriction on the public display of any car-based artwork ***on private property*** must be weighed heavily in balancing the city's interests and the effect of the ordinance on First Amendment rights. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002) ("there must be a balance between [the town's] interests and the effect of the regulations on First Amendment rights").

Further, the ordinance is not narrowly tailored to "the City's legitimate interests with only incidental restriction on protected expression." *Kleinman*, 597

F3d at 328. A complete ban of Petitioners' chosen means of expression through the roadside display of their car-based artwork on the Planet K property is not an "incidental restriction." *Id.* In *Bery*, the Second Circuit held that an exception for visual art was required in an otherwise valid municipal vending license system. Although the city had a significant interest in keeping public places safe and uncongested, a license requirement that effectively barred the visual artists from displaying or selling their art on the streets was "too sweeping to pass constitutional muster." 97 F3d at 697; *see Lusk v. Vill. of Cold Spring*, 475 F3d 480, 492 (2d Cir. 2007) (citing *Ladue*, 512 U.S. at 54) (concluding that the scope of the regulations was not justified because they foreclosed the homeowner's means of communication).

In this case, the junked vehicle ordinance is not narrowly tailored. With only limited exceptions for the storage of antique or special vehicles, the ordinance sweeps in all situations in which a property owner may display on his or her own property any work of visual art that incorporates a car or car parts. In this case, the "junked vehicle" has been made safe and has been modified and transformed into a work of art that the City stipulated was expressive. The city also stipulated that the medium of the "junked vehicle" was intended by the artists as an integral means of making an expressive statement. But the ordinance provides no exception for the artwork's display, such as *Bery* required. The ordinance is not narrowly tailored to further the city's interests in reducing blight and attractive nuisance problems. Instead, the ordinance places a substantial burden on expression. Similarly to the Ladue residents, Petitioners "are forbidden" to engage in protected artistic expression from their own

private property. *Ladue*, 512 U.S. at 54. Like the ordinance in *Ladue*, the junked vehicle ordinance unnecessarily sweeps too much protected expressive conduct within the ordinance and is constitutionally unsound. *Id.*

The Fifth Circuit also concluded erroneously that the ordinance did not foreclose alternative means of communication. *Kleinman*, 597 F.3d at 329. The Fifth Circuit ignores the requirement of "ample" channels of communication. *See Ladue*, 512 U.S. at 56 ("regulations that . . . shift the time, place, or manner of its use, must 'leave open ample alternative means of communication'"); *Ward*, 491 U.S. at 791 (a restriction on protected speech may be justified if it leaves "ample" alternative channels for communication of information). The fact that one "is permitted to communicate his message elsewhere does not end [the] analysis if the intended message is rendered useless or is seriously burdened." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (9th Cir. 2002) (citing *Ladue*, 512 U.S. at 56-57). The channels that the Fifth Circuit posits are neither alternatives to public display nor ample. Under the ordinance, any artwork incorporating a junked vehicle must be hidden completely from public view. As the ordinance is written, any artwork using an inoperable vehicle or parts of a vehicle cannot be displayed even on a rooftop, on a museum's grounds, or behind a window facing the street at a location such as Amicus Curiae Arthouse's downtown gallery in Austin, Texas. This total ban exceeds what is needed to protect the city's asserted interest. *See, e.g., Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 595 (4th Cir. 1993) (striking down sign ordinance that did not provide viable expression "alternative to homeowner ***on his property***") (emphasis original).

An artist's freedom to display artwork only in private does not provide an ample alternative channel for communication. "The public display and sale of artwork is a form of communication between artist and the public not possible in the enclosed, separated spaces of galleries and museums." *Bery*, 97 F.3d at 698. In short, "an alternative is not ample if the speaker is not permitted to reach the intended audience." *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009) (internal quotation marks omitted); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government had provided as a safe haven for crackpots.").

The First Amendment requires that Petitioners be allowed an ample channel for public communication to their desired audience.

CONCLUSION

For all of these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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